FILE COPY

OCT 16 19

CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1934.

No. 146.

CLIFTON MANUFACTURING COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

W. A. SUTHERLAND,
JOSEPH B. BRENNAN,
Atlanta, Georgia,
Counsel for Petitioner.

OF COUNSEL:
Samuel Nesbitt Evins,
Sutherland, Tuttle & Brennan,
Atlanta, Georgia.

SUBJECT INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Statement of the Case	2
Statutes Involved	3
Question Presented	3
Specification of Errors	3
Argument	4
Introduction	4
1. Discussion of limitations and other statutory provisions	6
2. Interpretation of T. D. 2797 and its effect on construction of subsequent limitation provisions	11
3. Practical considerations in support of Petitioner's position	15
4. Authorities	20
Conclusion	25
Appendix	26

AUTHORITIES.

Cases:

Adams, Cushing & Foster, Inc., 19 B. T. A. 89 20
Borer v. *Chapman*, 119 U. S. 587, 602 10
Bowers v. *N. Y. and Albany Lighterage Co.*, 273 U. S. 346 9
Brown & Co., 9 B. T. A. 753 24
Conrad Hdwe. Co., 8 B. T. A. 512 21
Davis Feed Co., 2 B. T. A. 616 ..... 20, 24
Denholm & McKay Co., 15 B. T. A. 225 24
Farmers Elevator Co., 13 B. T. A. 1079 24
Flint v. *N. Y., N. H. & H. R. R. Co.*, 283 U. S. 53 10
Florsheim Bros. v. *United States*, 280 U. S. 453 ..... 8, 11, 21
Goldmann Co., Isaac v. *Burnet*, 51 F. (2d) 427 ..... 4, 12
Globe-Excelsior Oak Tanning Co. v. *United States*, 2 F. Supp. 470 22
Helvering v. *New York Trust Co.*, 292 U. S. 455 14
Holstine Dry Goods Co., 16 B. T. A. 1124 20
Keystone Coal & Mining Co., 10 B. T. A. 295 24
Ley & Co., Fred T., 9 B. T. A. 749 24
Lucas v. *Pilliod Lbr. Co.*, 281 U. S. 245 8
Myles Salt Co. v. *Commissioner*, 49 F. (2d) 232 ..... 4, 5, 8

Page

Myles Salt Co., 18 B. T. A. 1742 24
National Lead Co. v. *United States*, 252 U. S. 140 14
National Paper Products Co. v. *Helvering*, 69 F. (2d) 857 ..... 2, 16, 21
Palmetto Coal Co., 11 B. T. A. 1154 ..... 18, 24
Ralston Purina Co. v. *United States*, 58 F. (2d) 1062.. 22
Stairs v. *Peaslee*, 18 How. 521 14
United States v. *Bailey*, 9 Pet. 238 14
United States v. *Cerecedo Hermanos y Cia.*, 209 U. S. 337 14
Unted States v. *Falk*, 204 U. S. 143 14
United States v. *Updike*, 281 U. S. 489 9
Valentine-Clark Co. v. *Commissioner*, 52 F. (2d) 346 4, 6, 8
Wanamaker, John, 8 B. T. A. 864 24
Whitney-Bodden Shipping Co. v. *United States*, 52 F. (2d) 1003 23
Woolford Realty Co. v. *Rose*, 286 U. S. 319 17
Zellerbach Paper Co. v. *Helvering*, 69 F. (2d) 852 .... 2, 16

Statutes:

Revenue Act of 1918:
Section 200 26
Section 205 (a) 26
Section 227 (a) 8, 26
Section 239 (a) 7, 26
Section 1305 13
Revenue Act of 1921:
Section 200 26
Section 205 (a) 27
Section 227 (a) 8, 26
Section 239 26
Section 250 (d) 6, 10, 14
Section 1307 13
Section 1324 (a) 23
Revenue Act of 1926:
Section 277 (a) (3) 7
Judicial Code:
Section 24 (20) 2
Section 240 (a) 1
United States Code, Title 40:
Section 270 10
Miscellaneous:
Treasury Decision 2797 ..... 11, 12, 14, 24, 27
Treasury Decision 3220 ..... 13, 28
Treasury Decision 3310 ..... 10, 15, 24, 27
Treasury Decision 3843 ..... 15, 28
Annual Report of Commissioner of Internal Revenue, 1919 19

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1934.

No. 146.

CLIFTON MANUFACTURING COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the District Court (R. 50-69) is reported in 3 F. Supp. 508. The opinion of the Circuit Court of Appeals (R. 120-122) is reported in 70 F. (2d) 102.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered April 4, 1934 (R. 122). Petition for writ of certiorari was filed July 3, 1934, and the writ was granted October 8, 1934 (R. 122). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

Petitioner, a corporation, brought an action in the District Court under Section 24(20) of the Judicial Code as amended by the Act of February 24, 1925, 43 Stat. 972, 28 U. S. C. Sec. 41 (20), for the refund of income and profit taxes assessed and collected for the fiscal year ending March 31, 1918. For that fiscal year Petitioner filed a return (R. 16-22) on May 28, 1918 and subsequently paid the tax therein shown to be due, approximately $171,000.00 (R. 72). After the passage of the Revenue Act of 1918, approved February 24, 1919, Petitioner filed on April 29, 1919, an additional return for the same period. (R. 72, 85-89.) The second return contained identically the same information as was disclosed by the first return (R. 3, 4, 38), and the additional tax of approximately $50,000,00 shown by the second return was due entirely to an increase in rates (R. 4, 5, 38). This additional tax was paid in due course (R. 72), and thereafter two additional assessments amounting to approximately $135,000.00 were made, and were paid under protest in 1926 (R. 6, 7, 40). A purported waiver of the statute of limitations was given by Petitioner on June 25, 1923, which, if valid, was kept in force through 1926 by subsequent waivers (R. 9-13). The only question now before this Court is whether or not the statute of limitations had already expired on June 25, 1923. If the first return started the running of the statute, it had then expired. If the statute did not begin to run until the filing of the second return, the statute had not then expired.

The District Court held that the statute ran only from the filing of the second return and that it had not expired on June 25, 1923 (R. 61-66). The Circuit Court of Appeals affirmed this decision on the authority of the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of *Zellerbach Paper Co.* v. *Helvering* and *National Paper Products Co.* v. *Helvering,* 69 F. (2d) 852 and 69 F.

(2d) 857, now pending in this Court, Nos. 35-39. (R. 121).

The grounds of Petitioner's attack upon the waivers given by Petitioner will not be discussed here, since the Petitioner and Respondent are agreed that the validity of the waivers is a matter to be decided by the Circuit Court of Appeals, if this Court holds that the statute of limitations had run on June 25, 1933 (Memorandum for the United States).

STATUTES INVOLVED.

The statutes and Treasury Decisions involved appear in the Appendix, where they do not appear in the body of the brief.

QUESTIONS PRESENTED.

Where complete income and excess profits tax returns for a fiscal year ended March 31, 1918, were filed on May 28, 1918 prior to the passage of the Revenue Act of 1918, and subsequently, on April 29, 1919, after the passage of the Revenue Act of 1918, a return showing the same information and a higher tax was filed, did the statute of limitations upon the assessment and collection of additional income and excess profits taxes begin to run upon the filing of the first or upon the filing of the second return?

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that the statutory period of limitation on assessment and collection of income and profits taxes for Petitioner's fiscal year ended March 31, 1918, did not begin to run upon the filing of Petitioner's original income and profits tax returns on May 28, 1918.

2. The Circuit Court of Appeals erred in holding that that statutory period of limitation on assessment and collection of income and profits taxes for Petitioner's fiscal year ended March 31, 1918, began to run upon the filing of Petitioner's amended return on April 29, 1919.

ARGUMENT.

Introduction.

The question as to when the statute of limitations on the collection of additional taxes begins to run is purely a question of the construction of the applicable statutes, since Congress can make any provision it may choose. The statutes of limitation in tax cases are made to run from the filing of "the return". Neither in the Limitation provisions nor elsewhere do the taxing acts, either for calendar or fiscal years, define what is meant by "the return". It is therefore necessary, in order intelligently to interpret the statute, to consider the relevant administrative rulings and the subsequent legislative affirmation or lack of affirmation of the interpretations set forth in these rulings; and also to consider fully the practical considerations that require one or another construction, certainly insofar as these practical considerations must be presumed to have been before Congress at the time of the enactment of the limitation provisions in question.

Three Federal appellate courts have decided similar cases in accordance with Petitioner's contentions,[1] and the opinions in those cases contain logical and forceful arguments in favor of Petitioner's position, based upon an interpretation of the statutory provisions in the light of careful analysis of the language used therein. The opinions in

[1] *Myles Salt Co.* v. *Commissioner*, 49 F. (2d) 232 (C. C. A. 5th); *Isaac Goldmann Co.* v. *Burnet*, 51 F. (2d) 427 (App. D. C.); *Valentine-Clark Co.* v. *Commissioner*, 52 F. (2d) 346 (C. C. A. 8th).

all three of those cases are copied in full in appendices to petitioner's briefs in Nos. 35-39. We shall assume that the arguments based upon a study of the statutory language alone will be covered before this case is reached, and our consideration of that subject will be very brief.

The administrative interpretation of the various Revenue Acts, so far as those interpretations relate to the matter here involved, is not fully discussed elsewhere, nor is there any discussion, other than in the *Myles Salt Co.* case, *supra,* of any legislative recognition of this administrative construction. Even where certain administrative interpretations are mentioned and relied upon, the basis for the rulings and their purpose and effect is not fully developed. We shall seek to develop this subject fully.

The practical considerations which require a holding that the statute begins to run from the filing of the first return, both because such holding works no undue hardship upon the Government and because a contrary holding, no matter how limited, would work unreasonable hardship upon many thousands of taxpayers by keeping old tax returns open until the present time, have never been properly developed and do not seem to have been fully understood. The failure to understand fully these practical considerations has no doubt been largely responsible for the lack of understanding of the true purpose and effect of the Treasury Decisions with reference to additional returns.

All the cases now before the Court are alike in all respects here essential.[2] They all involve fiscal years where there was a transition from one Revenue Act to another. In none of them was any new information required in the new return. While in all the transition years there were some differences between the Acts, the information re-

[2]We assume that the return filed in Nos. 37-39 would have been sufficient to start the running of the statute if filed after the 1921 Act was passed. That seems to have been the assumption of the Circuit Court of Appeals for the Ninth Circuit, although it seems to be questioned in the Government Brief in this Court. This Petitioner is not interested in that question.

quired to compute taxes under the two Acts in the case of substantially all taxpayers was practically identical. In any event, the differences in information required as between the different acts in all of the years in question was negligible in comparison with the errors that normally appear in returns filed under a single act. In all cases, statutory provisions covering fiscal years, returns, and periods of limitation, and the Treasury Decisions requiring returns of additional taxes under the later act in these transition periods, were substantially identical.[3] In view of the conceded similarity of the cases, we shall discuss them in a group in such manner as best serves to make our contentions clear.

1. Discussion of limitations and other statutory provisions.

The statute primarily to be construed in each of these cases is the limitations statute. The taxing provisions of the acts involved are important only insofar as they serve as an aid to construction of the limitations statute. In this case, and in Nos. 37-39, the limitations provisions are in entirely separate acts from the taxing provisions involved and were enacted subsequent to the enactment of the taxing acts and subsequent to the issuance under those acts of the Treasury Decisions with reference to additional returns of additional taxes.

The limitations provision in question in this case is Section 250 (d) of the Revenue Act of 1921, which provides as follows:

> "The amount of income, excess-profits, or war-profits taxes due under any return made . . . under

[3]We do not consider in this Brief cases where these various points of similarity do not exist, such as the *Updike* cases referred to in the Government Brief, in Nos. 37-39, involving a transition from 1916 to the 1917 Act, and which were decided by the Circuit Court of Appeals for the Eighth Circuit, which also decided the case of *Valentine-Clark Co.* v. *Commissioner*, *supra*.

> prior income, excess-profits, or war-profits tax Acts . . . shall be determined and assessed within five years after *the return was filed*, . . . and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts . . . shall be begun, after the expiration of five years after the date *when such return was filed.*" (Italics ours).

Section 277 (a) (3) of the 1926 Act, which is substantially identical, provides as follows:

> "The amount of income, excess-profits, and war-profits taxes imposed by . . . the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years *after the return was filed*, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period." (Italics ours).

The difficulty is in determining what is meant by "the return". The Circuit Court of Appeals for the Ninth Circuit concedes that "the meaning of the word 'return' has never been legislatively defined, and hence the courts have been required to define the term as applied to specific cases presented to them." (No. 37, Record, p. 128).

The taxing statute involved in this case, Revenue Act of 1918, Section 239 (a), requiring corporation returns, provides as follows:

> "Sec. 239 (a). That every corporation subject to taxation under this Title . . . shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this Title."[4]

The Government's argument is that no return filed before the passage of the 1918 Act can fulfill the requirement of a

[4]The provisions for a profits tax return are substantially identical. Revenue Act of 1918, Sec. 336.

return under the 1918 Act, the theory apparently being that only by conscious effort to comply specifically with each and every provision of the 1918 Act can a return such as is contemplated by that Act be filed. This was the view of the Circuit Court of Appeals for the Ninth Circuit (No. 37, Record 128-135), and was apparently the view of the District Court in this case (R. 65).

A much stronger argument on the basis of the technical construction of the language of the statute is made in favor of Petitioner's position by the Circuit Courts of Appeals in the *Myles Salt Co.* and *Valentine-Clark Co.* cases, *supra,* where the Circuit Courts of Appeals refer to section 227 (a) of the 1921 Act[5] which requires the return to be filed within two months and fifteen days after the end of the taxable year. Those courts conclude that since Congress made no special provision to the contrary for 1921 fiscal years, where returns were past due under the terms of section 227 (a) when the 1921 Act was passed, the Act necessarily must be construed as adopting the returns already filed. (Brief of Petitioners, Nos. 37-39, pp. 61, 74.)

The Government's argument and the reasoning of the Circuit Court of Appeals for the Ninth Circuit assumes that the only kind of a return which can start the running of the statute of limitations is one filed in strict conformity with the requirements of Section 239 (a). Such a construction would make perfect accuracy and completeness necessary to a return. It is clear that there is no such requirement. It was held by this Court, in the case of *Florsheim Brothers* v. *United States,* 280 U. S. 453, that a so-called "tentative return", which is not intended as a basis for assessment, will not start the running of the statute of limitations. Nor will the statute run from a return which is not sworn to as the Act requires. *Lucas* v. *Pilliod Lumber Co.,* 281 U. S. 245. But this Court in the *Florsheim Brothers* case, *supra,* fully recognizes that a return may be defective and

[5]Section 227 (a) of the 1918 Act is identical. See Appendix, p. 26.

still be sufficient to start the running of the statute of limitations. The return in that case did not comply with the essential requirements of a return under any Act and was not intended as a basis for assessment, while here there is no doubt that the return was intended when filed to be a final return, and that it was sufficient, without question, had it been refiled after the passage of the 1918 Act, to start the running of the statute of limitations. Such a return, although filed before the 1918 Act was passed, complies with the requirements of the 1918 Act sufficiently to start the running of the limitations period.

The weight of the arguments on the basis of a technical construction of the language of the statute is sufficient to require a conclusion in Petitioner's favor. This is certainly true when it is remembered that limitations provisions, like other provisions of taxing statutes, are to be construed liberally in favor of taxpayers. *Bowers* v. *New York and Albany Lighterage Co.*, 273 U. S. 346, 349; *United States* v. *Updike*, 281 U. S. 489, 496.

When such a conclusion is confirmed by administrative interpretation, subsequently approved legislatively, and by all the practical considerations which will be shown to bear on the matter, there can be no doubt as to the propriety of the construction for which we contend.

Before leaving a discussion of the meaning of the statutes based solely upon a study of the statutory language, we wish to answer the arguments made against our contentions on pages 8 and 9 of the Government Brief in Nos. 37-39. The Government argues that it would follow from petitioners' contentions that the limitation period would have unequal application. As the Solicitor-General there states the point (at p. 9):

> "As to returns filed subsequent to the enactment of the law, it would be effective only upon the expiration of four years, whereas to others it would constitute a

> bar within a shorter period, dependent upon the length of time 'the return' was made before the enactment of the law."

Such clearly was intended to be the result. The situation suggested must exist in millions of cases clearly falling within the provisions of Section 250 (d) of the 1921 Act. That section imposed the first time limitation upon the collection of taxes for 1917 and prior years, and the period was dated from the filing of returns, which in the usual case had been filed years before the act was passed.

The Government argues further that petitioners' contentions must necessarily proceed upon the assumption that a limitation may operate against a liability before the liability itself has arisen, and the Government urges that this assumption is unsound, citing *Borer* v. *Chapman*, 119 U. S. 587, 602. It is submitted that the case cited was based upon a *construction* of the statute of limitations there involved and is not authority against the Petitioner's contention in the present case. There is certainly no reason why Congress could not, if it wanted to, provide that the limitation against the assessment of taxes should run from an event which preceded the liability for the taxes. Such a situation is not usual, but it is not unique. For example, the one year limitation period in the Hurd Act (40 U. S. C. sec. 270), which is applicable to independent suits by materialmen, begins to run upon final settlement by the Government with the principal contractor, although such suits cannot be commenced until six months after such settlement. See also: *Flint* v. *N. Y., N. H. and H. R. R. Co.*, 283 U. S. 53.

2. Interpretation of Treasury Decision 2797 and its effect on the construction of subsequent limitation provisions.

Fifteen days after the enactment of the Revenue Act of 1918, the Treasury issued Treasury Decision 2797, which reads as follows:

> "If a corporation has before February 25, 1919, filed a return for a fiscal year ending in 1918 and paid or become liable for a tax computed under the Revenue Act of 1917, *and is subject to additional tax* for the same period under the revenue act of 1918, *the returns covering such additional tax* shall be filed at the same time as returns of persons making returns for the calendar year 1918 are due under existing rulings, and payment of such additional tax is due in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918. If no part of the tax for such fiscal year was due until after February 24, 1919, the whole amount of tax due, including tax due under the *original return* and additional tax due under the *amended return,* will be payable in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918." (Italics ours.)

It will be noted that far from treating the original return as a nullity, this Treasury Decision clearly recognizes the return already filed as the original return, and requires a new return only for the additional tax. In view of this requirement, it seems only significant of the true situation that the Treasury Decision refers to the first return as the "*original return*" and to the second return as the "*amended return*".[6] The use of this language is relied upon by all of the appellate courts in the three cases

[6]It is of course recognized by this Court in the *Florsheim Brothers* case, *supra*, that an amended return does not toll the running of the limitations period.

in Petitioner's favor cited in footnote 1, *supra*, p. 4. See Brief for petitioners in Nos. 37-39, pp. 62, 66-67,[7] 74.

The Government now contends that the 1918 Act requires a new return after its enactment in every case and suggests that Treasury Decision 2797 was liberal in "*waiving*" that requirement in certain cases. If the statute required a new return in every case, we find no authority for the Treasury Department to waive a return and cause the statute of limitations to run from a time other than that specified by Congress. If, however, there was such authority in the Treasury Department, it equally had authority to treat the first return as the "*original*" return in all cases, and where a new return was required to treat the new return as an "*amended*" return. We have shown, however, that the statute did not require a new return and there is therefore no question of the right of the Treasury Department to waive such requirement. Treasury Decision 2797 was promulgated for the practical purpose of collecting promptly large additional taxes the collection of which could not otherwise be readily made, and therefore required additional returns to show additional taxes where additional taxes were due under the later Act. Where there was no new revenue act, but taxpayers generally had misconstrued

---

[7]The following is from the opinion of Judge Groner in the *Isaac Goldmann Co.* case, *supra:*

"The new act provided the occasion, and the return furnished the basis, and the act itself imposed on the Commissioner (250 (b) Revenue Act 1921) the duty of examination to the end that the correct tax should be ascertained. The retroactive provisions of the 1921 Act present no novelty, for the 1918 Act itself replaced retroactively the 1917 Act. Under the provisions of the 1918 Act, the tax was increased over that exacted under either the 1916 or 1917 Act, but, under its provisions as to filing returns on the fiscal year basis, the Commissioner ruled (Treasury Decision 2797) that the new return required was satisfied by inclusion only of the items embracing the additional tax, and spoke of the former returns, i. e., those filed before the Act was approved, as original returns, and the additional returns required as supplemental or amended returns, and while we do not invoke this use of words as foreclosing the question or as controlling, we nevertheless think it clearly reflects the real situation, and that, in this aspect, the returns filed by appellant were, especially in view of the admission that they were in all respects honestly believed to represent the true state of appellant's liability, valid returns and not a nullity."

the law, Treasury Decision 3220 (Appendix, p. 28) was issued requiring additional returns from those who had in error computed invested capital on a valuation basis. The authority for issuing both regulations is derived from Section 1307 of the 1921 Act and Section 1305 of the 1918 Act, which are identical. Section 1305 of the 1918 Act reads as follows:

> "Sec. 1305. . . . Whenever in the judgment of the Commissioner necessary, he may require any person, by notice served upon him, to make a return or such statement as he deems sufficient to show whether or not such person is liable to tax."

We cite Treasury Decision 3220 only to show that the fact that additional returns may be required does not indicate that the first return is a nullity. Nor are additional returns required only in fiscal years between two acts.

If the Commissioner had required additional returns for the purpose of auditing the returns, the Treasury Department would have required new returns in each case where there was additional information necessary under the later act, whether in favor of or against the taxpayer, and whereever there was a change in tax liability, upward or downward; because it has long been the announced and followed policy of the Treasury Department to correct mistakes appearing on returns in favor of as well as against the Government, and the Commissioner would have wanted new returns showing all aditional information in all cases. When the Treasury Department makes the requirement of a new return dependent upon *additional taxes* being due and not upon the basis of additional information being required, it must be clear that the purpose of the Treasury Decision is the collection of additional taxes, and that the matter of audits and of the statute of limitations is not involved in the requirement, and that the use of the words "*original returns*" and "*amended return*" is clearly indicative of the true situation.

In the light of this formal interpretation by the Treasury Department of the 1918 Act, as applied to 1918 fiscal years, in force from the time the 1918 Act was passed, Congress in re-enacting into the 1921 Act provisions as to returns and fiscal years substantially identical with those in the 1918 Act and in enacting at the same time the limitation provision here in question, Section 250 (d) of the 1921 Act, *supra*, p. 6, must clearly be held to have confirmed the Commissioner's original interpretation of the 1918 Act as adopting the returns filed prior to the passage of that Act as "the return" of the taxpayer. *United States* v. *Falk*, 204 U. S. 143; *Stairs* v. *Peaslee*, 18 How. 521; *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337; *National Lead Co.* v. *United States*, 252 U. S. 140, 146-147. This necessarily means that any subsequent return required by the Commissioner in this class of cases just as in any other case, should be treated as an amended return.

Another related and well-recognized principle is that Congress must be presumed to have legislated with knowledge of the existing established usage of an executive department of the Government. *United States* v. *Bailey*, 9 Pet. 238, 256. Under this principle it must be clear beyond any doubt that when Congress enacted the limitations provision in Section 250 (d) of the 1921 Act and provided that the period should date from the filing of the return, Congress must have had reference to the "return" which the Treasury Department in a formal Treasury Decision recognized as the "original" return in the case of a 1918 fiscal year and not to the return which is there characterized as an "amended" return.[8]

Petitioner's construction of Treasury Decision 2797 under the 1918 Act, which is the same as that adopted in

[8]This principle of construction recently has been properly limited by this Court to the extent of presuming Congressional familiarity only with such formal pronouncements as Treasury Decisions and regulations but not with office decisions, General-Counsel's memoranda, etc. *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 468.

the three appellate court decisions in Petitioner's favor[9] is borne out by the further history and by regulations of the Treasury Department in the transition years of the other acts involved in these cases. Fiscal years in the transition between the 1918 and 1921 Acts are covered by Treasury Decision 3310 (Appendix p. 27), those between the 1924 and 1926 Acts by Treasury Decision 3843 (Appendix, p. 28). All of these Treasury Decisions are substantially the same. All of them require returns of "*additional taxes*" where *additional* taxes are due under the later act and clearly make no requirement of an additional return where additional taxes are not due.

3. Practical considerations in support of petitioner's position.

We submit that the position of the taxpayers in this group of cases is clearly established by the arguments heretofore made upon the basis of a construction of the statutory provisions in the light of the language used therein, the administrative practice thereunder, and the Congressional action in re-enacting the same provisions in later acts. But if there should be any possible doubt as to the proper construction of the statutes, such doubt should be dispelled by the strong, *practical* considerations that call for a ruling that the limitation period runs from the filing of the first return in these cases.

The Government here contends, as has been pointed out, that in the case of a fiscal year for which a complete return was filed prior to the passage of an act which was made applicable retroactively to such year, the limitation period runs only from a return filed after the passage of such act. Where no new return is filed after the passage of such act, the Government contends that there is no limitation on assessment and collection. Such is the situation in the *Na-*

[9]See footnote 1, *supra*.

tional Paper Products Co. and *Zellerbach Paper Co.* cases involving 1921 fiscal years (Nos. 37-39). The Government's argument logically goes to the extent of denying that the limitation period can run from the return filed prior to the enactment of the later act, even where no additional tax is imposed by the new act.[10]

In this connection, it should be remembered that the Treasury Decisions promulgated with reference to fiscal years ending in 1918, 1921 and 1925 required additional returns only where additional taxes were imposed as a result of the change of law. As a result, hundreds of thousands of taxpayers have relied upon these Treasury Decisions and have failed to file new returns where no additional taxes were imposed. If the Government's argument should be accepted in the cases now before the Court, hundreds of thousands of taxpayers will be deprived of the benefit of any limitation period on assessment and collection of taxes for those years, because they relied upon the Treasury Decisions and have filed no additional returns where the Treasury Decisions impliedly directed that such returns were unnecessary. If this Court should rule, as the Government here urges, the Commissioner will be free to re-open many thousands of cases long since considered closed by both the Commissioner and taxpayers.[11] Taxpayers would be at the mercy of the Commissioner, who would be in a position to go back ten or fifteen years or longer to make additional assessments which carry pre-

[10]The Board of Tax Appeals holds against the Government's contention in cases involving these particular circumstances. See cases cited in the second paragraph of footnote 9 of page 11 of the Government Brief in Nos. 37-39, which are more fully discussed hereafter. The Government Brief in Nos. 37-39 shows clearly that the Government contends that the filing of a new return is necessary in all cases where the new act becomes applicable retroactively, whether or not additional taxes are imposed by the new act.

[11]The Commissioner has acquiesced in the Board of Tax Appeals' decisions holding that the limitation period begins to run upon the filing of the first return for a 1921 fiscal year prior to the passage of the 1921 Act where no additional taxes were imposed by that Act. See footnote 22, *infra*.

sumptive validity and which the taxpayers would have the burden to overcome at a time when memories are stale and books and records are lost. If there were any doubt as to the meaning of the statutes, they should certainly be construed so as to avoid such an intolerable situation.[12] Indeed such a result is unthinkable and would defeat entirely in this class of cases the beneficent purposes of the limitations provisions. It is made clear below that no requirement of justice to the Government requires the holding for which Respondent contends.

It may be suggested—although the Government does not now suggest—that this intolerable result may be avoided by holding, as the Board of Tax Appeals has held, that where no additional tax is imposed by the later act the statute of limitations begins to run from the filing of the first return.[13] This holding of the Board is contrary to its holding where additional taxes are due under the later Act.

The view taken by the Board is not only without logical support but involves serious practical difficulties and results in untold confusion, if not in almost as great injustice as the result suggested above. If the Board of Tax Appeals is correct in holding that the first return in such cases starts the limitations period where no additional tax is imposed by the later act but not where such act does impose additional taxes, the taxpayer would be at his peril to determine with absolute accuracy all the possible differences between the acts in question in order to decide whether an additional tax (however small in amount) was due, so as to make a new return necessary. Moreover, and perhaps more important, the Commissioner himself would have no way of knowing whether the limitations period began to run in any case from the first return, unless he made a com-

[12] "Doubt, if there be any, is not likely to survive the mischiefs certain to be engendered by any other ruling." *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 329.

[13] See pages 23, 24, *infra*, and footnote 22.

plete audit, since without such investigation he could not be sure that an additional return was required, whether or not one had been filed. To be on the safe side, the Commissioner would have to complete his audit within the limitation period from the first return; and if he did this he could assess the tax within that time. It would be difficult to believe that Congress intended to lay down any such impractical rule to govern a determination of the running of the statute of limitations, a matter which requires, for all purposes of protection to the Government and taxpayer, a thoroughly practical and workable rule.

If the Board's distinction be adopted, it must then be determined whether that distinction is to be based upon actual facts or upon the assumption that the information disclosed in the first return is correct. The Board has held that a new return is required only where, upon the assumption that the information contained on the first return is correct, an additional tax would be due under the later act. *Palmetto Coal Co.*, 11 B. T. A. 1154. In other words, the Board holds that, although on the true facts a new return under the later act would show additional taxes due to changes in the law, no new return will be required if an additional tax will not be shown on the basis of the assumption of the correctness of the facts stated in the original return. That would result in the absurdity of having the limitations period run against the Government in many cases where incorrect returns were filed, so that it would have been more difficult for the Government to find out whether additional taxes were actually due under the later act, on the basis of the true facts; whereas an absolutely correct return showing on its face that additional taxes are due under the later act, and maybe the exact amount of the additional taxes due, would not be sufficient to start the running of the statute of limitations because the taxpayer

did not go through the useless formality of filing a new return after the passage of the later act.[14]

If there were any practical considerations or considerations of fairness which would require a holding that the statute of limitations should not begin to run upon the filing of the first return but only upon the filing of the second return, the Court might seek for some means of sustaining the Government's position. There are no such practical considerations or considerations of fairness which require any such result. As a matter of fact, as has been pointed out above, there was no practical reason for a new return so far as affording a basis for the Commissioner's audit was concerned; because the differences in information required under the earlier and the later acts in all of the years here involved were so inconsequential in comparison with the natural errors which normally crept into the returns due to defective bookkeeping methods and ignorance of the law, that the differences in information required as between one act and another was of no practical importance.[15] This is borne out by the fact that the Treasury Decisions, in requiring new returns in certain cases and in

[14]It seems to us absurd to suggest that any such impracticable distinctions have anything whatever to do with the running of the limitations period. No possible reason for such an impractical result suggests itself. But as a construction of T. D. 3310, the distinction is probably sound. T. D. 3310, as we contend, was intended only as a means of collecting promptly additional taxes imposed by the later act on account of changes effected by the later act; where such additional taxes would be shown to be due on taxpayer's own computations, such computations would be expected to be made on the assumption that the information disclosed in the earlier returns was correct. There was no expectation that the taxpayer would, in making the new return, reconsider the correctness of the facts previously reported.

[15]In the Annual Report of the Commissioner of Internal Revenue for the fiscal year ended June 30, 1919 (p. 18), it was said:

"The uncertainties inevitably incident to a new and elaborate system of taxation have resulted in many errors in the returns filed and also in many misconceptions regarding the respective rights of taxpayers and the Government. The intensive audit of every return of the many millions received became necessary as a pre-requisite to the correction of errors, both against the Government and against taxpayers.

"It has been a fundamental policy that the Government should with equal

not requiring new returns in others, did not base the requirement of the new return upon the basis of *different information* required under the two acts, but simply upon the basis of *additional taxes* being required by the later act.

4. Authorities.

There are three carefully considered, well-reasoned appellate court decisions in Petitioner's favor.[16] The Government has confessed error in another circuit.[17]

The only appellate court opinions against Petitioner's contentions are those of Judge Wilbur of the Ninth Circuit in the cases pending here as Nos. 35-39, relied upon by the Circuit Court of Appeals for the Fourth Circuit in deciding against Petitioner in this case.

---

diligence refund amounts illegally collected and collect taxes illegally withheld."

In this connection, it is interesting to note that the original income and profits-tax return for this Petitioner for its 1918 fiscal year showed a tax liability of approximately $170,000.00 (R. 72). The additional tax shown on the amended return, due to changes by the 1918 Act, was approximately $50,000.00 (R. 72). However, as a result of the Bureau's audit and examination additional assessments were made in the sum of approximately $135,000.00 (R. 6, 7, 39, 40).

More illustrations, some even more striking, may be found from an analysis of the cases relied upon by the Government and collected in footnote 9 on pp. 10-11 of the Government Brief in Nos. 37, 38, 39. In the first of those cases decided in favor of the Government, *Davis Feed Co.*, 2 B. T. A. 616, involving a 1918 fiscal year, it appeared that the original return disclosed a tax liability of $12,902.03, the amended return showed an additional tax of $762.19 due to changes effected by the 1918 Act, and the Bureau's audit resulted in the determination of an additional tax of $3,541.13. In the other cases cited at the same place, the additional tax resulting from changes effected by the new revenue act did not exceed $200 or $300, although the deficiencies involved many thousands of dollars.

[16] See footnote 1, *supra*, p. 4.

[17] *Adams, Cushing & Foster, Inc.*, 19 B. T. A. 89, reversed on confession of error by Commissioner, 342 C. C. H. Par. 1443.184 (C. C. A. 1st, Sept. 10 1931). The Government also confessed error in the case of *Gus Holstine Dry Goods Co.*, 16 B. T. A. 1124, appealed to the Court of Appeals of the District of Columbia, 342 C. C. H. Par. 1443.184, (Sept. 10, 1931).

The Circuit Court of Appeals for the Ninth Circuit, after conceding that there is no statutory definition of "return", proceeds to argue that since the 1921 Act was not enacted until after the first return was filed that return could not comply with the requirement of a return under that Act or within the meaning of subsequent limitations provisions. The learned Circuit Judge does not, we believe, appreciate the significance of the wording of the Treasury Decisions in question. He certainly shows no appreciation of the true purpose of the Treasury Decisions or of the reasons why they require new returns only where additional taxes are due. He shows no understanding of the fact that there is no practical necessity for a new return as an aid to audit. He confuses a return substantially as complete as returns generally are with a so-called tentative return, merely because it is filed before the enactment of the new act, thereby wholly misinterpreting the holding of this Court in the *Florsheim Brothers* case, *supra*. He fails utterly to appreciate the importance of subsequent legislative affirmation of the executive promulgations, which indeed he does not mention. With regard to the very important practical considerations involved, he shows appreciation only of the difficulties that would be involved if it were held that the question as to which return starts the running of the statute of limitations period is made to depend upon the effect of the new act upon the particular taxpayer. He shows no appreciation whatever of the very unfortunate practical result of holding that where no second return was filed, the statute of limitations would never begin to run. And in the opinion Nos. 35-36 (69 F. (2d) 857, 862), the Circuit Court of Appeals seems to assume that a return which contains no computation of tax is for that reason not such a return as will start the running of the limitation period, which is directly contrary to the established rule. *Conrad Hardware Co.,* 8 B. T. A. 512, in which the Commissioner has acquiesced, VII-1 C. B. 7.

The discussions of the courts of original jurisdiction of the question here involved, relied upon by the Government and the Circuit Court of Appeals for the Ninth Circuit, are hardly worthy of consideration. The case of *Ralston-Purina Co.* v. *United States*, 58 F. (2d) 1062, contains no reasoning whatever and relies upon court decisions which are clearly distinguishable, some of which do not even relate to the same character of question. The opinion in that case does not even refer to the appellate court decisions in Petitioner's favor above referred to,[18] which had been decided many months before that case was decided. The case of *Globe-Excelsior Oak Tanning Co.* v. *United States*, 2 Fed. Supp. 470, also decided by the Court of Claims on the authority of the *Ralston-Purina Co.* case, *supra*, and the cases there relied upon, makes no reference whatever to the arguments here urged and apparently did not consider them, and was decided apparently without any appreciation of the fact that the cases here relied upon by Petitioner[19] were decided largely upon the basis of the interpretation and effect of Treasury Decision 2797 as applied to 1918 fiscal years. The court distinguishes those cases on the basis of undefined (and no doubt largely imaginary) differences between the 1918 and 1921 fiscal years, which the Government now concedes are not important in this connection. The opinion of the District Court in this case, also relied upon by the Circuit Court of Appeals of the Ninth Circuit, while much longer, is subject to much the same criticism as the *Globe-Excelsior Oak Tanning Co.* case, *supra*, and in addition contains so many inaccuracies in statements of law and fact that no profit can be derived from a discussion of it.[20]

---

[18]See footnote 1, *supra*, p. 4.

[19]See footnote 1, *supra*, p. 4.

[20]For example, the learned District Judge says (R. 68):

"Whatever may be true in other respects, it has been firmly established by the Supreme Court that statutes limiting the time for action by the Government in collecting its taxes *are to be strictly construed in its favor. DuPont*

The *Updike* cases, referred to in footnote 3, page 6, *supra,* have no real relation to the present question, nor has the case of *Whitney-Bodden Shipping Co.* v. *United States,* 52 F. (2d) 1003, which holds simply that where a 1918 fiscal year return was filed before the passage of the 1918 Act, a second return was filed after its passage, the taxpayer, filing a second return and paying the additional tax there called for, did not pay for an additional assessment within the meaning of Section 1324 (a) of the 1921 Act relating to interest. The reasoning of the Court was that a tax "paid pursuant to an additional assessment", within the interest section, does not contemplate any voluntary payment on an original or amended return filed by the taxpayer. We agree with the Court's conclusion, but the case has nothing whatever to do with the present question.

The only other authorities to be considered are the decisions of the Board of Tax Appeals. The Board of Tax Appeals has always held that whenever additional taxes are due under the later act, even in cases like the case at bar and Nos. 35-39, where no additional information is required by reason of the later act, a second return is necessary to start the running of the statute of limitations.[21] On the other hand, the Board has held and now holds that the statute starts to run upon the filing of the first return

---

Powder Co. v. *Davis,* 264 U. S. 456; *Bowers* v. *New York & Albany Lighterage Co.* 273 U. S. 346." (Italics ours.)

And in attempting to distinguish between the 1918 and 1917 Acts, the District Court says:

"a differentiation was made between invested capital and income" (*which* of course has been true since the beginning of time) "a provision was made for taxation of appreciation in property values" (which has never been true under any Federal tax law) . . . "a differentiation was made between earned and unearned income" (which differentiation was not made at that time) (R. 62).

It would needlessly consume the time of the Court further to discuss this opinion.

[21]See cases cited in Government Brief in Nos. 37-39, first paragraph, of footnote 9, p. 10.

where no additional tax is due under the latter act.[22] The principles upon which the Board bases its decisions are not readily discoverable, but an examination of the cases of *John Wanamaker, Philadelphia,* 8 B. T. A. 864, and *Myles Salt Co., Ltd.,* 18 B. T. A. 1742, including the dissenting opinion in latter case on the one hand, and the opinion in the case of *Fred T. Ley & Co.,* 9 B. T. A. 749 on the other, will disclose a shifting from one position to another as to whether the 1921 Act requires a new return in all cases under the later act and whether the Treasury Department, by Treasury Decision 3310, simply relieves taxpayers of the requirement where no additional tax is due, or whether the statute does not require a new return in any case and the Treasury Decision does require a new return in some such manner as will effect the force of the first return in beginning the running of the statute of limitations.

The cases cited in footnote 22, below are not earlier cases decided in confusion and not now representing the view of the Board, as is indicated by the Government in its brief in Nos. 37-39, footnote 9, p. 11. As a matter of fact, the first of these cases was decided by the Board after the Board had laid down, in the case of *John Wanamaker, Philadelphia,* 8 B. T. A. 864, the rule which has been consistently followed in cases where additional taxes are imposed by the later act. The Commissioner[23] now acquiesces in the decisions of the Board requiring no new return under the later act where no additional taxes are imposed thereby.

The first case decided by the Board on the question here involved was the case of *Davis Feed Co.,* 2 B. T. A. 616, which involved a 1918 fiscal year. It is significant that the Board did not have before it Treasury Decision 2797 and apparently had before it few, if any, of the many considerations here urged.

---

[22] *Fred T. Ley & Co., Inc.,* 9 B. T. A. 749; *M. Brown & Co.,* 9 B. T. A. 753; *Keystone Coal & Mining Co.,* 10 B. T. A. 295; *Palmetto Coal Co.,* 11 B. T. A. 154; *Farmers Elevator Co.,* 13 B. T. A. 1079; Acq. VII-2 C. B. 13; *Denholm & McKay Co.,* 15 B. T. A. 225; Acq. VIII-1 C. B. 12.

[23] See footnote 22, *supra.*

CONCLUSION.

In the light of the foregoing reasons, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the case remanded to that court for further proceedings.

Respectfully submitted,

W. A. Sutherland,
Joseph B. Brennan,
Atlanta, Georgia,
Counsel for Petitioner.

OF COUNSEL:
Samuel Nesbitt Evins,
Sutherland, Tuttle & Brennan,
Atlanta, Georgia.

APPENDIX A.

STATUTORY PROVISIONS AND TREASURY DECISIONS NOT QUOTED IN BRIEF.

Requirement of Filing Returns

Revenue Act of 1918 and 1921, Sec. 239:

"That every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title."

Time of Filing Return

Revenue Act of 1918, Sec. 227 (a):

"That returns shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the fifteenth day of March."

Revenue Act of 1921, Sec. 227 (a):

"That returns (except in the case of nonresident aliens) shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March."

Definition of Taxable Year

Revenue Act of 1918, Sec. 200:

". . . The first taxable year, to be called the taxable year 1918, shall be the calendar year 1918 or any fiscal year ending during the calendar year 1918."

Revenue Act of 1921, Sec. 200:

". . . The first taxable year, to be called the taxable year 1921, shall be the calendar year 1921 or any fiscal year ending during the calendar year 1921."

Fiscal Years

Revenue Act of 1918, Sec. 205 (a):

"That if a taxpayer makes return for a fiscal year beginning in 1917 and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title I of the Revenue Act of 1917, which the portion of such period

falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period."

"Any amount heretofore or hereafter paid on account of the tax imposed for such fiscal year by Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917, and by Title I of the Revenue Act of 1917, shall be credited towards the payment of the tax imposed for such fiscal year by this act, and if the amount so paid exceeds the amount of such tax imposed by this act, or . . . the excess shall be credited or refunded in accordance with the provisions of section 252."

Revenue Act of 1921, Sec. 205 (a):

"That if a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title II of the Revenue Act of 1918 at the rates for the calendar year 1920 which the portion of such period falling within the calendar year 1920 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1921, which the portion of such period falling within the calendar year 1921 is of the entire period,

"Any amount paid before or after the passage of this Act on account of the tax imposed for such fiscal year by Title II of the Revenue Act of 1918 shall be credited toward the payment of the tax imposed for such fiscal year by this Act, and if the amount so paid exceeds the amount of such tax imposed by this Act, the excess shall be credited or refunded in accordance with the provisions of section 252."

Treasury Decision 2797

Approved March 11, 1918 (Quoted in Brief, p. 11, *supra*)

Treasury Decision 3310

T. D. 3305, approved March 16, 1922, is amended to read as follows:

"If any taxpayer has, before November 23, 1921, filed a return for a fiscal year ending in 1921, and paid or become liable for a tax computed under the Revenue Act of 1918, and is subject to additional tax for the same period under the Revenue Act of 1921, a return covering such additional tax shall be filed at the same time as the returns of persons making returns for the fiscal year ending February 28, 1922, are due under the laws and regula-

tions, and payment of such additional tax will be due in the same installments and at the same times as in the case of payments based on returns for the fiscal year ending February 28, 1922. Attention is directed to the provisions of sections 214 (a)9 and 234 (a)8 of the Revenue Act of 1921.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved March 28, 1922.
A. W. MELLON,
Secretary of the Treasury.

Treasury Decision 3843

"Any corporation which has filed a return for a fiscal year ending in 1925 and paid or become liable for a tax computed under the Revenue Act of 1924, and is subject to additional tax for the same period under the Revenue Act of 1926, must file a new return covering such additional tax on or before May 15, 1926. Payment of the additional tax may be made at the time the return is filed or, if installment payments are desired, such installments must be paid at the time they would be due if based upon a return for the fiscal year ended February 28, 1926.

D. H. BLAIR,
Commissioner.

Approved April 1, 1926,
GARBRART B. WINSTON,
Acting Secretary of the Treasury."

Treasury Decision 3220.

To Collectors of Internal Revenue and others concerned:

An examination of income and excess profits tax returns for 1917 and subsequent years has disclosed that many taxpayers have used appreciated and inflated values in determining invested capital shown in such returns contrary to section 207 of the Revenue Act of 1917 and section 326 of the Revenue Act of 1918.

This office has held consistently that the use of appreciated or inflated values in determining invested capital is not permissible and this ruling has been sustained by the United States Supreme Court in the case of the *La Belle Iron Works* v. *The United States* (41 Sup. Ct. 528; T. D. 3051).

All taxpayers who, in the preparation of their income and excess profits tax returns for 1917 and subsequent years, have used appreciated or inflated values in determining the amount of their invested capital are required to file with the collector of internal revenue within 90 days from date of this decision amended returns for each of such years, in which the invested capital shall be computed strictly in accordance with the law and regulations and without the use of appreciated or inflated values. It is not required

that such amended returns shall include the figures shown in the original returns which are unaffected by this decision. Only such figures as are necessary to show the correct value used in the computation of invested capital and such totals as are necessary to a redetermination of the tax need be shown. Payment of the additional tax shown to be due on such amended returns must also be made at the time the returns are filed.

Failure to file amended returns within the time specified will subject taxpayers to the penalties provided for in section 3176, United States Revised Statutes, as amended.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved: August 26, 1921.

A. W. MELLON,
Secretary of the Treasury.